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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-713

CONTINENTAL CAN COMPANY, INC.,
Petitioner,

versus

L. L. BREWTON LUMBER COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Continental Can Company, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 19, 1973, with Application for Rehearing being denied on August 3, 1973.

OPINIONS BELOW

The original opinion of the United States District Court for the Western District of Louisiana, Alexandria Division, was rendered under Docket Number 14,680, with Reasons for Judgment being rendered and Judgment being signed on May 26, 1971, copies of which

Reasons and Judgment are attached hereto and made a part hereof and are appended to this petition in the Appendix at page number 1a. The original Judgment of the United States Court of Appeals for the Fifth Circuit is reported at 460 F.2d 963, and a copy is attached hereto and appended to this petition in the Appendix at page number 8a. Following the remand by the Court of Appeals, the District Court, on December 8, 1972, handed down written Reasons for Judgment, with Judgment being signed on January 10, 1973, copies of which Reasons and Judgment are attached hereto and appended to this petition in the Appendix at page 14a. The matter was placed on the Summary Docket of the United States Court of Appeals for the Fifth Circuit as Number 73-1652, and the decision of the District Court was affirmed on June 19, 1973, as per copy attached hereto and appended to this petition in the Appendix at page number 25a. On August 3, 1973, the Petitions of Continental Can Company, Inc. for Rehearing and for Rehearing En Banc were denied by the Court of Appeals, as per copy attached hereto and appended to this petition in the Appendix at page number 26a.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on June 19, 1973, and the Petitions of Continental Can Company, Inc. for Rehearing and for Rehearing En Banc were denied by the Court of Appeals on August 3, 1973. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1970).

QUESTIONS PRESENTED

The instant action seeks to set aside a certain long-term timber lease of approximately 1,360 acres of land in Winn Parish, Louisiana. Primarily, the case involves the application of Louisiana law to the lease in question and to the provisions for the extensions of the lease. The final decision in the instant matter will have far-reaching effects and will affect numerous leases throughout the State of Louisiana and throughout the United States. The decision will, in fact, be a landmark decision, particularly insofar as the property law of the State of Louisiana is concerned. The Court of Appeals for the Fifth Circuit has voided a nine-year timber lease which provided for nine-year extensions thereof up to a total of ninety-nine years. The following questions are presented:

(1) If a novel question of Louisiana law relating to adequacy of consideration was, in fact, necessary to the decision of this case, should the District Court have abstained from deciding such question?

(2) Was the lease in question a legally binding instrument under Louisiana law?

(3) Is a purchaser of Louisiana land, bought specifically subject to a lease, estopped from contesting the validity of the lease?

STATUTORY PROVISIONS

The instant case involves no federal statutes, rules or regulations.

The following articles from the Louisiana Revised Civil Code are involved:

Article 2462:

". . . One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated. . . ."

Article 2464:

"The price of the sale must be certain, that is to say, fixed and determined by the parties.

It ought to consist of a sum of money, otherwise it would be considered as an exchange.

It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.

It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised."

Article 2684:

"The duration and the conditions of leases are generally regulated by contract or by mutual consent."

Article 2733:

"If the Lessor sells the thing leased, the purchaser cannot turn out the tenant before his lease has expired, unless the contrary has been stipulated in the contract."

STATEMENT OF THE CASE

The instant matter originated in the Eighth Judicial District Court, Parish of Winn, State of Louisiana, as Suit Number 16,247. Continental Can Company, Inc. removed said matter to the United States District Court for the Western District of Louisiana, Alexandria Division, on the basis of complete diversity of citizenship, Continental Can Company, Inc. being a New York corporation and L. L. Brewton Lumber Company, Inc. being a Louisiana corporation. The amount in controversy exceeds, exclusive of interest and costs, $10,000.

The instant action seeks to set aside a certain long-term timber lease of approximately 1,360 acres of land in Winn Parish, Louisiana, owned by L. L. Brewton Lumber Company, Inc.

Prior to the acquisition by L. L. Brewton Lumber Company, Inc. of the fee interest in and to the property in question, Louisiana Development Company, Inc.

and Mansfield Hardwood Lumber Company entered into a contract for sale and purchase of timber and land lease, a copy of which is attached hereto and appended to this petition in the Appendix at page 27a. All of the rights of Mansfield Hardwood Lumber Company under said contract have been conveyed, transferred and assigned to Continental Can Company, Inc. L. L. Brewton Lumber Company purchased its interest in said property subject to said contract between Louisiana Development Company, Inc. and Mansfield Hardwood Lumber Company.

For a recited consideration of $20,000, Louisiana Development Company, Inc. sold to Mansfield Hardwood Lumber Company all of its timber, wood and forest products on approximately 1,360 acres of land and leased said land to Mansfield Hardwood Lumber Company for an initial period of nine years, with the option to extend for nine-year periods, not exceeding ninety-nine years from the date of the contract. Lessor had only a 3/5ths interest in the timber, wood and forest products on 260 acres of the property. Various public roads, rights of way and easements existed across the subject property.

If the buyer-lessee chose to exercise its option to renew for a nine-year period, in addition to the original consideration paid, it was to pay unto the seller-lessor on or before the date of the expiration of the nine-year term an amount equal to the real property taxes and local assessments which the seller-lessor had paid during the preceding nine years.

The lease in question was limited to the buyer-lessee's having "the right to remove standing or growing timber, wood and forest products from the leased premises, (Having) the right to plant and grow trees and other forest products thereon, and to deaden, cut and remove such trees and forest products." Otherwise, the seller-lessor had the full right to utilize said property.

The fee to the 1,360 acres under lease, together with other property, was acquired by L. L. Brewton Lumber Company, Inc., the plaintiff herein, in 1967 for $125,000. The deed to it was made specifically subject to the lease in question. Between the date of its acquisition in 1967 and the end of 1970, the plaintiff realized at least $558,505 from uses of the property not related to the growing of timber. The lease itself gives clear evidence that the primary utilization of the property was in mining. See, e.g. paragraph 5 of the Lease, Appendix B, p. 30a. As contemplated by the lease, Continental and its predecessors in interest have cultivated the timber on the property.

In its first decision, the District Court rendered Judgment cancelling the lease in question and reserving to plaintiff the right to have the defendant account for timber cut and removed from the subject property. In its ruling, the District Court held that there was "no rental consideration for the lease and therefore no valid lease which was capable of being extended or renewed."

From said Judgment of the District Court, Continental Can Company, Inc. appealed. The United States Court of Appeals for the Fifth Circuit reversed and remanded, stating:

> "Under the unambiguous terms of the 1950 agreement, the finding of lack of rental consideration for the original lease term is clearly erroneous. The agreement plainly recites that $20,000 was received as consideration for the lease. Payment was made of the fixed 'price' required by Louisiana law as consideration of a leasehold interest. See *Arata* v. *Louisiana Stadium and Exposition District*, 1969, 254 La. 579, 225 So.2d 362, 366; Civil Code of La. Arts. 2669, 2670. The fact that the agreement does not recite or refer to this payment as rent is of no significance.
>
> Furthermore, the agreement makes it quite clear that payment of the $20,000.00 was also consideration for the grant of the option for renewal rights, and that the basis for determining the amount of renewal rentals was definite and readily ascertainable. See *Arata, supra*. The rentals have been periodically paid to continue the viability of Continental's leasehold interest." 460 F.2d 963 at 964.

Upon remand, the District Court again rendered Judgment against Continental Can Company, Inc., cancelling and erasing the lease in question and reserving unto L. L. Brewton Lumber Company, Inc. the right to recover damages for all timber cut and removed since June 14, 1967. The District Court, in its Reasons

for Judgment, discussed whether or not the consideration paid was sufficient under Louisiana law. The Court stated:

> "The time of the original lease having expired, there being no valid provisions for the extension or renewal thereof judgment will be granted cancelling and erasing the 1950 lease agreement from the public records and reserving plaintiff's right to sue for damages."

From the above Judgment, Continental Can Company, Inc. again appealed to the United States Court of Appeals for the Fifth Circuit. The instant matter was placed on the Summary Docket of said Court under Docket Number 73-1652. On June 19, 1973, Judgment was rendered affirming the decision of the District Court. Continental Can Company, Inc. timely asked for rehearing in this matter and asked that the rehearing be en banc. Said Application for Rehearing was denied on August 3, 1973.

REASONS FOR GRANTING THE WRIT

By affirming, without written reasons, the Judgment of the District Court in this matter, the United States Court of Appeals for the Fifth Circuit rendered a decision which will have far-reaching effects and which will affect numerous leases throughout the State of Louisiana and throughout the United States. This decision is contrary to settled law in Louisiana.

1. If A Novel Question Of Louisiana Law Relating To Adequacy Of Consideration Was, In Fact, Necessary To The Decision Of This Case, The District Court Should Have Abstained From Deciding Such Question.

As discussed below, Petitioner believes that the contract at issue here raises no question under Louisiana law with respect to the adequacy of the consideration prescribed in the contract for the renewals or extensions of the original nine-year lease. Petitioner did not, and could not have foreseen at the time it sought removal of this action from the Louisiana District Court, Parish of Winn, to the United States District Court that the latter Court would perceive such a purportedly unresolved question: that is, whether reimbursement by the lessee of property taxes and local assessments paid by the lessor may under any conditions constitute adequate consideration for a lease of real property for the growing, cutting and removal of timber. While we believe that no such question was presented to the District Court upon the facts of this case and under the law of Louisiana, we respectfully submit that upon a finding that such question was present and required resolution, the District Court should have abstained from deciding such question pending decision thereof by the courts of the State of Louisiana pursuant to the principles enunciated in *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941), and its successor cases.

The instant case involves no federal constitutional issue, as did *Pullman*, of which decision might be avoided by abstention of the federal district court

pending resolution of an unresolved state law question. Rather, the District Court should have abstained from deciding the question of Louisiana law which it perceived because the question presented "special circumstances" which required deference to the policy of the State of Louisiana, as construed by its state courts. *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967). The property law of the State of Louisiana is especially local and peculiar to that state. *See, e.g.*, 2 A.N. Yiannopoulos, *Louisiana Civil Law Treatise* § 4, at 10 (1967). Further, Louisiana has a substantial interest in the development of and commerce in its rich timber resources. *See, e.g., La. Const.* Art VI, § 1. The principle that a state's interest in the use of its valuable natural resources is a "special circumstance" which may require abstention by a federal court asked to resolve a question of state law related to such interest has been enunciated by this Court. *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U.S. 593 (1968) (per curiam).

We respectfully submit that the decision of the District Court in this case clearly illustrates the need for careful consideration by a federal court of the requirements of the abstention doctrine when it perceives a need to resolve a question of the significance of that resolved here. The District Court's decision interjects into Louisiana law a principle which would prohibit (or, as here, invalidate) a timber lease unless the rent therefor exceeds the taxes on the property. The decision establishes a minimum rental for this kind of lease, and excludes all other possible factors which might, and in fact are, customarily considered by a lessor and a lessee in determining consideration for

the lease. No evidence was presented to the District Court, and we have found none, which indicates that the State of Louisiana has ever considered or proposed such a substantial and far-reaching revision of its principles relating to timber leases. If the District Court here believed that the instant case required a decision either approving or rejecting such a revision of state policy, abstention and deference to the state courts, we submit, was required.

2. Contrary To The Decision Of The District Court And The Court Of Appeals, The Lease In Question Is A Legally Binding Instrument Under Louisiana Law.

The lease in question was a form of instrument in common use in Louisiana and was commonly utilized by Mansfield Hardwood Lumber Company, Continental's predecessor in interest.

Article 2684 of the Revised Civil Code of Louisiana provides:

> "The duration and the conditions of leases are generally regulated by contract, or by mutual consent."

Leases for ninety-nine years are valid in Louisiana. *State* v. *Board of Adm'rs of Tulane Education Fund*, 125 La. 432, 51 So. 483 (1910); *Prisock* v. *Boyd*, 199 So.2d 323 (La. Cir. Ct. App. 1967).

Under the law of Louisiana, a contract of lease is dependent on three factors: the thing, the price and the consent of the parties. *La. Revised Civil Code Art.* 2670; *Marcel* v. *Denton,* 195 So.2d 163 (La. Cir. Ct. App. 1967); *Faroldi* v. *Nungesser,* 144 So.2d 568 (La. Cir. Ct. App. 1962).

The lease here in question complies with the requirements of Louisiana law. The thing leased is property described, and it is self-evident that the parties consented thereto. The consideration for the original purchase of timber and the original term of the lease was $20,000. The consideration for the extensions was not only the making of the original lease, but the payment of taxes and assessments. The payment of taxes and assessments was not nominal consideration, for the property had other valuable uses to the lessor, and the payment of these taxes permitted it to operate the property for these other uses free of the burden of real property taxes.

Options to extend leases are common in Louisiana and are upheld by the Louisiana courts, and a provision in a lease providing for the renewal thereof is binding on the parties to the contract and their assignees. *Beuhler* v. *Palace Market Co., Inc.,* 146 La. 355, 86 So. 896 (1921); *Magnolia Petroleum Co.* v. *Carter,* 2 So.2d 680 (La. Cir. Ct. App. 1941).

Article 2464 of the Louisiana Revised Civil Code provides that consideration ought not to be out of all proportion with the value of the thing for which it is paid.

The District Court and the Court of Appeals erred in basing their decision on Louisiana cases involving nominal considerations only. In one of the two cases relied upon by the District Court, *Murray* v. *Barnhart*, 117 La. 1023, 42 So. 489 (1906), the Supreme Court of Louisiana held that $2.00 could not be considered a serious consideration for the right to terminate a twenty-five-year lease of 158 acres of land to be mined for oil and gas, the court noting the difference between the common law, under which such a nominal consideration is sufficient, and the civil law, which presumes that parties to a contract which specifies such a "trifle" as consideration do not intend that it be paid at all. 117 La. at 1030-31, 42 So. at 491-92. Clearly, the consideration prescribed in the contract at issue here was not intended as, and was not a "trifle", or a nominal or symbolic sum whose actual payment was not contemplated by the parties.

In the other case relied upon by the District Court, *Northeast Louisiana Detachment of Marine Corps League* v. *City of Monroe*, 253 So.2d 107 (La. Cir. Ct. App.), *writ refused*, 254 So.2d 619 (La. 1971) (without opinion), the Louisiana Court of Appeal for the Second Circuit invalidated a ninety-nine year lease of 3.21 acres given by the defendant city to the plaintiff for $1.00, the court finding that the lease imposed no obligation on the plaintiff to perform any civic duties or to make its premises available for public use, which might be regarded as consideration.

Citing no additional cases or other authority, the Court then held the consideration recited in the con-

tract at issue here inadequate. In so doing, the Court has engrafted two new principles onto the body of Louisiana contract law, as more specifically applicable to leases of real property for purposes of growing, cutting and removing timber. The District Court's finding of inadequacy of consideration rests upon the Court's apparent position that such a lessor must receive as rent "a reasonable percentage of the monetary return from the timber cut". No precedent in Louisiana law supports this rewriting of the law of adequacy of consideration.

The second new principle adopted by the District Court is similarly unsupported by Louisiana authority. The Court held that under no conditions could rent consisting solely of the reimbursement of taxes be considered serious consideration as contemplated by Louisiana law. We respectfully submit that this holding is devoid of any basis in legal principle or reasoning or in economic reality. The District Court has in effect held that a property owner cannot lease his property for a limited use to any one lessee who does not agree to pay a consideration which exceeds the amount of taxes on the property paid by the lessor. The Court has thus defined and required the earning of a new kind of profit, to be an excess of the consideration paid by the lessee over the amount of property taxes payable by the lessor, even though, as in the instant case, the property owner may be receiving consideration from more than one lessee or licensee for different leases or uses of the same property, and thus might elect to fix the amounts of consideration to be paid by each with a view to the aggregate amount

which he will receive for the use of his land. We submit that the District Court's establishment of this new policy for the regulation of timber leases is contrary to the law of Louisiana and represents an unwarranted interference, and one violative of the doctrine of *Eric R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), of a federal court into a domain clearly and peculiarly that of the State of Louisiana.

3. Contrary To The Decision Of The District Court And The Court Of Appeals, The Purchaser Of Louisiana Land Bought Specifically Subject To A Lease Is Estopped From Contesting The Validity Of The Lease.

The original term of the lease was nine years, followed by ten nine-year renewal options. The lease, made in 1950, was renewed twice and was attacked by the plaintiff during the term of the second renewal, the benefits of the lease having theretofore been accepted by the plaintiff and its predecessors in title.

The instrument by which the plaintiff acquired title to the subject property provided:

> "In addition to the exceptions and reservations hereinabove set forth, this conveyance is made subject . . . to the following right of way, leases, reservations and other rights immediately hereinafter enumerated . . . .
>
> Ninth. Contract for sale and purchase of timber between Louisiana Development Company, Inc.

> **and Mansfield Hardwood Lumber Company, dated September 9th, 1950, and recorded in Book 71, page 497 of the Conveyance Records of Winn Parish, Louisiana, assigned to Robert Gair Company, Inc. and reassigned to Continental Can Company, Inc. . . .**
>
> **Grantor's warranty hereinabove is confined to title to said property, and grantor makes no representations or warranties respecting the condition of the property conveyed or its fitness for any particular use . . . which premises are accepted by grantee 'as is' and grantee hereby agrees to indemnify and hold grantor harmless of and from any such injury or damage."**

Under Louisiana law, the purchaser of leased property has no right to evict the tenant unless the contrary has been stipulated in the contract. Article 2733 of the Revised Civil Code of Louisiana.

One purchasing leased property during the existence of the lease occupies the same position as the original lessor. *Houssiere Latreille Oil Co.* v. *Jennings-Heywood Oil Syndicate*, 115 La. 107, 38 So. 932 (1905); *Walker* v. *Van Winkle*, 8 Mart. (N.S.) 560 (1830); *Claque* v. *Townsend*, 1 Mart. (N.S.) 264 (1823).

Under Louisiana law, the District Court and the Court of Appeals erred in permitting the plaintiff herein, having purchased the property subject to the lease and having accepted the benefits of the consideration, to attack the lease.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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CERTIFICATE

I hereby certify that a copy of the foregoing Application for Writs has been served upon L. L. Brewton Lumber Company, Inc. by mailing a copy of same, in the United States mail, postage prepaid, to Honorable Hiram J. Wright, Courthouse, Winnfield, Louisiana, and Mr. Charles B. Bice, Attorney at Law, Courthouse, Winnfield, Louisiana.

Jonesboro, Louisiana, this the ____ day of October, 1973.

BOBBY L. CULPEPPER

APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Title Omitted)
No. 14,680

FOR PLAINTIFF
Messrs.:
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Winnfield, Louisiana

FOR DEFENDANT
William H. Baker
P. O. Box E
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NAUMAN S. SCOTT, JUDGE:

This is an action to annul and cancel a certain timber lease agreement executed by Louisiana Development Company, Inc., Lessee, in favor of Mansfield Hardwood Lumber Company, Lessor, dated September 9, 1950, and covering approximately 1360 acres of land in Winn Parish, Louisiana. Plaintiff, L. L. Brewton Lumber Company, Inc. (hereinafter referred to as "Brewton") is the successor in title of the Lessor, Louisiana Development Company, Inc., and Continental Can Company, Inc. (hereinafter referred to as "Continental") is the successor in title to Mansfield Hardwood Lumber Company.

The lease agreement (Exhibit "C" attached to the Joint Stipulation of Fact) is actually a contract for the sale and purchase of timber and a land lease. This agreement provides for the sale of timber and then provides further for a lease for the sole purpose of cutting and removing existing timber and for the growing, cutting and removing of timber during the term of the lease or any renewal or extension thereof. The specific pertinent provisions are the following:

2. "As a part of the consideration of this agreement, Seller-Lessor leases and lets and by this act does lease and let unto the Buyer-Lessee, its successors and assigns, to the extent herein provided, and subject to the terms and conditions hereof, the real estate hereinbefore first described for a *term of nine (9) years from the date hereof* for the purposes herein expressed, and *hereby grants to Buyer-Lessee, its successors and assigns, the right and option to make successive extensions or renewals of this lease for a term of nine (9) years each upon the conditions herein set forth, provided, that this lease may not be extended beyond a date ninety-nine (99) years from the date hereof.* In order to renew this lease, Buyer-Lessee shall give written notice to Seller-Lessor of its intention to do so before the expiration of each successive nine-year term.

3. ***Buyer-Lessee may successively renew or extend this lease for successive nine year terms by giving Seller-Lessor written notice of its intention to do so and by paying to Seller-Lessor on or before the date of the expiration of each nine year term an amount equal to the real property taxes and local assessments which Seller-Lessor has paid on land described in this lease during the nine years immediately preceding the expiration of such nine year term.***

Seller-Lessor shall notify Buyer-Lessee at least thirty days prior to expiration of each nine year term that the lease will expire unless renewed and at the same time advise as to the amount of the necessary renewal payment. If such notice is not timely given, then Buyer-Lessee shall have thirty days after Seller-Lessor gives such notice in which to give notice of intent to renew and to make the payment herein provided for.

6. The Buyer-Lessee, upon the execution of this instrument, has paid to the Seller-Lessor the sum of *Twenty Thousand and No/100 ($20,000.00) Dollars* in cash, and other good and valuable consideration, the receipt of which is hereby acknowledged and a full acquittance is granted therefor; *the same being paid as consideration for the sale of the timber and for this lease, as well as for the options to renew and all*

other rights hereby granted to Buyer-Lessee.

7. The Seller-Lessor and Buyer-Lessee agree that this sale and lease agreement is made and is subject to the following conditions and stipulations which are a part of this agreement and the consideration therefor:

(h) Each Seller-Lessor warrants the title to the timber, wood and other forest products herein leased only so far as the interest owned by each Seller-Lessor, but it is agreed that in the event of eviction of the Buyer-Lessee from any portion of said land on account of failure of title to any portion thereof, that the obligation of the Seller-Lessor under his warranty shall be limited to the refund of the proportionate part received by him in cash of the sum of Fifty and No/100 ($50.00) Dollars per acre on the lands to which title fails or from which Buyer-Lessee is evicted, at the time of such eviction or title failure."

Defendant, Continental, in support of its Motion for Summary Judgment and on the merits, has urged that plaintiff, Brewton, is estopped by the provision in its deed of acquisition from The Carey Salt Company dated June 14, 1967 (Exhibit "A" attached to the Joint Stipulation of Fact) that it acquired title to the 1360 acres subject to the aforesaid timber sale and lease (Exhibit "C"). We find that the language referred to was included in the sale for the purpose of limiting the warranty of the vendor, The Carey Salt

Company, and does not effect an estoppel against Brewton.

Continental has also urged that the "lease in question was a common type instrument used by Mansfield Hardwood Lumber Company. It amounted to no more than a ninety-nine (99) year lease". We disagree. The instrument provides specifically "for a term of nine (9) years from the date hereof". The additional nine year periods are continuously, repeatedly and specifically referred to as "extensions or renewals". These periods cannot be considered nine year anniversary dates upon which the rental was due. The contract does not provide for rent or even mention the word rent. Paragraph 3 provides that the Lessee may renew or extend for successive nine year terms by giving notice and by paying an amount equal to the Lessor's taxes for the nine previous years. Certainly this cannot be considered rent. The Lessee has no legal obligation to pay any of these amounts. The Lessor has no legal right to sue for them because they are not legally due at each successive nine year period. The Lessee may pay or may choose not to pay, depending on his determination to renew or not to renew the lease. Indeed, under the second paragraph of Paragraph 3, it appears that the Lessee could remain in possession forever, without payment, if the Lessor fails to notify him and to advise him "as to the amount of the necessary renewal payment." The Twenty Thousand and No/100 ($20,000.00) Dollars was "paid as consideration for the sale of the timber and for this lease, as well as for the options to renew and all other rights hereby granted to Buyer-Lessee." If the parties intended that this amount included the rent for the entire

term of ninety-nine (99) years, then the lease was a paid up lease for ninety-nine (99) years. This contention is incompatible with the specific provisions for a term of nine years and for successive nine year renewals or extensions.

We hold that the renewal payments provided in Paragraph 3 are valid considerations for the right to renew or extend a valid lease. We find further that there is no rental consideration for the lease and therefore no valid lease which was capable of being extended or renewed, L.S.A.-C.C. 2669-2674.

The basic lease being invalid, there is no need to consider collateral contentions advanced by counsel.

Alexandria, Louisiana, this 26th day of May, 1971.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

Filed: May 28, 1971

JUDGMENT

(Title Omitted)
No. 14,680

This cause having come on for trial and having been submitted on written memoranda, the law and evidence being in favor thereof, it is:

ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, L. L. Brewton Lumber Company, Inc., and against Continental Can Company, Inc., declaring that certain contract of lease incorporated in the agreement executed by Louisiana Development Company, Inc. in favor of Mansfield Hardwood Lumber Company dated September 9, 1950 and recorded in Conveyance Book 497, Page 71, Entry Number 48125, records of Winn Parish, Louisiana, to be null, void and of no effect and reserving to plaintiff, L. L. Brewton Lumber Company, Inc., the right to recover damages from defendant, Continental Can Company, Inc., for all timber cut and removed since June 14, 1967 from the lands covered by said agreement. Defendant, Continental Can Company, Inc. is to pay all costs. It is further

ORDERED, ADJUDGED AND DECREED that Jesse O. Anders, Clerk of Court and Ex-Officio Recorder of Mortgages of Winn Parish, Louisiana, cancel and erase said instrument, insofar as it provides for the lease of the lands described therein, from the Conveyance and Mortgage Records of Winn Parish, Louisiana.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 26th day of May, 1971.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

Filed: May 28, 1971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3544

L. L. BREWTON LUMBER COMPANY, INC.,
Plaintiff-Appellee,

versus

CONTINENTAL CAN COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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(May 16, 1972)

Before GOLDBERG, DYER and SIMPSON,
Circuit Judges.

PER CURIAM: Continental appeals from an order of the district court cancelling a lease incorporated in a contract for sale and purchase of timber and land lease agreement executed by Brewton's predecessor in title in favor on Continental's assignor. We reverse.

The facts are stipulated. On September 9, 1950, Louisiana Development Company, as seller-lessor, and Mansfield Hardwood Lumber Company, as buyer-less-

ee, entered into a contract for the lease of 1360 acres of land in Winn Parish, Louisiana, and for the sale and purchase of timber thereon. All rights of the lessee under the agreement were conveyed and assigned to Continental on October 26, 1956 by a subsequent assignee of Mansfield Lumber. On June 14, 1967, Brewton acquired title to the fee from the Carey Salt Company which had, in 1964, acquired title from Louisiana Development. This conveyance was explicitly subordinated to rights granted in the 1950 agreement as reassigned to Continental. It is undisputed that each of the foregoing transactions was bona fide.

The 1950 agreement Brewton seeks to annul provides for the sale of timber, and the lease of lands for the purpose of cutting and removing existing timber, and the growing, cutting, and removing of timber during the term provided for in the agreement. The lease is for a term certain of nine years, and further grants to the lessee, its successors and assigns, the option to make successive extensions or renewals of the original lease for terms of nine years each, not to extend beyond 99 years from the original date of execution. The option may be exercised upon written notice and payment by the lessee of a rental for the extension term equal to the real property taxes and local assessments paid on the land by the lessor during the nine years immediately preceding the expiration of such nine year term. The agreement acknowledged receipt from the lessee, upon execution of $20,000 as consideration for the sale of the timber, for the lease, and for the option to renew granted thereunder. It was jointly stipulated below that Continental and its predecessors in title had complied with all pro-

visions of the 1950 agreement and had, until 1969, when payment was tendered and refused, paid as required the rental fee for each renewal period.[1]

The trial court held that no rental consideration had been paid for the basic nine-year lease period, apparently treating the payment of the $20,000.00 as consideration only for the grant of the leasehold, the grant of the option rights, and the sale of the standing timber. It declared the basic lease invalid, ordered the attempted 1968 renewal cancelled, and reserved to Brewton the right to recover damages from Continental for all timber cut and removed since the date of Brewton's acquisition of the fee.

Under the unambiguous terms of the 1950 agreement, the finding of lack of rental consideration for the original lease term is clearly erroneous. The agreement plainly recites that $20,000 was received as consideration for the lease. Payment was made of the fixed "price" required by Louisiana law as consideration for the conveyance of a leasehold interest. *See Arata v. Louisiana Stadium and Exposition District*, La. 1969, 225. So.2d 362, 366; Civil Code of Louisiana, Art. 2669-2670. The fact that the agreement does not recite or refer to this payment as rent is of no significance.

Furthermore, the agreement makes it quite clear that payment of the $20,000.00 was also consideration for the grant of the option for renewal rights, and that the basis for determining the amount of renewal ren-

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[1]The pertinent provisions of the agreement appear as an appendix to this opinion.

tals was definite and readily ascertainable. *See Arata, supra.* The rentals have been periodically paid to continue the viability of Continental's leasehold interest.

Since the district court found the basic lease invalid it did not reach the other issues raised by the parties. We reverse and remand for consideration of the undisposed of issues. Costs are taxed against Brewton.

REVERSED and REMANDED.

APPENDIX

2. As a part of the consideration of this agreement, Seller-Lessor leases and lets and by this act does lease and let unto the Buyer-Lessee, its successors and assigns, to the extent herein provided, and subject to the terms and conditions hereof, the real estate hereinbefore first described for a *term of nine (9) years from the date hereof* for the purposes herein expressed, and *hereby grants to Buyer-Lessee, its successors and assigns, the right and option to make successive extensions or renewals of this lease for a term of nine (9) years each upon the conditions herein set forth, provided, that this lease may not be extended beyond a date ninety-nine (99) years from the date hereof.* In order to renew this lease, Buyer-Lessee shall give written notice to Seller-Lessor of its intention to do so before the expiration of each successive nine-year term.

3. *Buyer-Lessee may successively renew or extend this lease for successive nine year terms by giving Seller-Lessor written notice of its intention to do so and by paying to Seller-Lessor on or before the date of the expiration of each nine year term an amount equal to the real property taxes and local assessments which Seller-Lessor has paid on land described in this lease during the nine years immediately preceding the expiration of such nine year term.*

   Seller-Lessor shall notify Buyer-Lessee at least thirty days prior to expiration of each nine year term that the lease will expire unless renewed and at the same time advise as to the amount of the necessary renewal payment. If such notice is not timely given, then Buyer-Lessee shall have thirty days after Seller-Lessor gives such notice in which to give notice of intent to renew and to make the payment herein provided for.

6. The Buyer-Lessee, upon the execution of this instrument, has paid to the Seller-Lessor the sum of *Twenty Thousand and no/100 ($20,000.-00) Dollars* in cash, and other good and valuable consideration, the receipt of which is hereby acknowledged and a full acquittance is granted therefore; *the same being paid as consideration for the sale of the timber and for this lease, as well as for the options to renew and all other rights hereby granted to Buyer-Lessee.*

7. The Seller-Lessor and Buyer-Lessee agree that this sale and lease agreement is made and is subject to the following conditions and stipulations which are a part of this agreement and the consideration therefor:

(h) Each Seller-Lessor warrants the title to the timber, wood and other forest products herein leased only so far as the interest owned by each Seller-Lessor, but it is agreed that in the event of eviction of the Buyer-Lessee from any portion of said land on account of failure of title to any portion thereof, that the obligation of the Seller-Lessor under his warranty shall be limited to the refund of the proportionate part received by him in cash of the sum of Fifty and No/100 ($50.00) Dollars per acre on the lands to which title fails or from which Buyer-Lessee is evicted, at the time of such eviction or title failure.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ALEXANDRIA DIVISION

CIVIL ACTION
No. 14,680

L. L. BREWTON LUMBER COMPANY, INC.

versus

CONTINENTAL CAN COMPANY, INC.

FOR PLAINTIFF

MESSRS.
Hiram J. Wright
Post Office Box 626
Winnfield, Louisiana 71483

FOR DEFENDANT

William H. Baker
Holloway, Baker, Culpepper & Brunson
Post Office Box E
Jonesboro, Louisiana 71251

SCOTT, JUDGE: This is an action to annul and cancel an instrument styled "Contract for Sale and Pur-

chase of Timber and Land Lease" executed by Louisiana Development Company, Inc., Lessor, in favor of Mansfield Hardwood Lumber Company, Lessee, dated September 9, 1950, and covering approximately 1360 acres of land in Winn Parish, Louisiana. Plaintiff, L. L. Brewton Lumber Company, Inc., (hereinafter referred to as "Brewton"), is the successor in title of the original lessor, Louisiana Development Company, Inc., and Continental Can Company, Inc., (hereinafter referred to as "Continental"), is the successor in title to the original lessee, Mansfield Hardwood Lumber Company.

The agreement in question provides for the sale of timber and then provides further for a lease for the sole purpose of cutting and removing existing timber and for the growing, cutting and removing of timber *during the term of the lease or any renewal or extension thereof.* (Emphasis supplied). The specific pertinent provisions are the following:

> "2. As a part of the consideration for this agreement, Seller-Lessor leases and lets and by this act does lease and let unto the Buyer-Lessee, its successors and assigns, to the extent herein provided, and subject to the terms and conditions hereof, the real estate hereinbefore first described for a *term of nine (9) years from the date hereof* for the purposes herein expressed, and *hereby grants to Buyer-Lessee, its successors and assigns, the right and option to make successive extensions or renewal of this lease for a term of nine (9) years each upon the conditions herein set forth,*

provided, that this lease may not be extended beyond a date ninety-nine (99) years from the date hereof. In order to renew this lease, Buyer-Lessee shall give written notice to Seller-Lessor of its intention to do so before the expiration of each successive nine-year term.

3. *Buyer-Lessee may successively renew or extend this lease for successive nine year terms by giving Seller-Lessor written notice of its intention to do so and by paying to Seller-Lessor on or before the date of the expiration of each nine year term an amount equal to the real property taxes and local assessments which Seller-Lessor has paid on the land described in this lease during the nine years immediately preceding the expiration of such nine year term.*

Seller-Lessor shall notify Buyer-Lessee at least thirty days prior to expiration of each nine year term that the lease will expire unless renewed and at the same time advise as to the amount of the necessary renewal payment. If such notice is not timely given, then Buyer-Lessee shall have thirty days after Seller-Lessor gives such notice in which to give notice of intent to renew and to make the payment herein provided for.

4. *During the term of this lease or any renewal or extension thereof, as herein provided,* Buyer-Lessee shall have the right to remove

standing or growing timber, wood and forest products from the leased premises; . . .

6. The Buyer-Lessee, upon the execution of this instrument, has paid to the Seller-Lessor the *sum of Twenty Thousand and No/100 ($20,000.00) Dollars in cash*, and other good and valuable consideration, the receipt of which is hereby acknowledged and a full acquittance is granted therefor; *the same being paid as consideration for the sale of the timber and for this lease, as well as for the options to renew and all other rights hereby granted to Buyer-Lessee.*

* * * *

(h) Each Seller-Lessor warrants the title to the timber, wood and other forest products herein leased only so far as the interest owned by each Seller-Lessor, but it is agreed that in the event of eviction of the Buyer-Lessee from any portion of said land on account of failure of title to any portion thereof, that the obligation of the Seller-Lessor under his warranty shall be limited to the refund of the proportionate part received by him in cash of the sum of Fifty and No/100 ($50.00) Dollars per acre on the lands to which title fails or from which Buyer-Lessee is evicted, at the time of such eviction or title failure." (Emphasis supplied).

In the first hearing this Court did not consider the validity of the 1950 contract as a timber sale with a

stipulated term for removal. This question was not before the Court, since plaintiff made no demand for timber cut before 1967. No party has claimed that the 1950 contract was not a valid sale agreement. However, this Court did consider the validity of the agreement as a lease and, for reasons stated in that opinion, held the agreement to be invalid as a lease. The Court of Appeals reversed in part, holding that the agreement was valid as a lease agreement for the original nine year term thereof, "the basic lease", and remanded "for consideration of the undisposed of issues".

The agreement, by its own terms, is not a 99 year lease. It provides for a nine year lease, with options to renew for a term of nine years each, not in excess of ninety-nine (99) years from the date of the instrument.

The Court of Appeals, in its interpretation of the agreement in question, found that the $20,000 consideration was paid for the sale of the timber, the initial nine year term of the lease, and the options to renew the lease. It also found the rent or consideration for each nine year renewal period to be an amount equal to the real property taxes and local assessments Seller-Lessor had paid on the land during the nine years immediately preceding the expiration of such nine year term. Therefore, the issue now before this Court is whether or not this is a valid rent or consideration under Louisiana law.

The Civil Code of Louisiana spells out the requirements for a valid lease in the following articles:

Art. 2669: **Lease or hire is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price.**

Art. 2670: **To the contract of lease, as to that of sale, three things are absolutely necessary, to-wit: the thing, the price and the consent.**

Art. 2671: **The price should be certain and determined and should consist of money.**

Art. 2674: **To let out a thing is a contract by which one of the parties binds himself to grant to the other enjoyment of a thing during a certain time, for a certain stipulated price which the other binds himself to pay him.**

Under the provisions of Article 2464 of the code the amount of the rent must be serious, that is the amount of the rent cannot be out of all proportion to the value of the lease.

The landmark decision in Louisiana on the doctrine of serious consideration is *Murray* v. *Barnhart*, 117 La. 1023, 42 So. 489 (1906). In considering the validity of the lease before it the Louisiana Supreme Court stated:

> "At common law 'the slightest consideration is sufficient to support the most onerous obligation. The inadequacy, as has been said, is for the parties to consider at the time of making the agreement, and not for the court when it

> is sought to be enforced.' 9 Cyc. 365; A. & E. E. vol. 6, p. 694. But under our law the consideration 'must be serious': 'it must not be out of all proportion with the value of the thing.' Article 2464, Civ. Code. That article has special reference to the price of a sale, but the principle it involves is not peculiar to sales. It is a general principle of the civil law, and as old as the civil law itself."

Another case involving the validity of a lease in the City of Monroe is *Northeast Louisiana Detachment of Marine Corps League* v. *City of Monroe,* 253 So.2d 107 (1971) in which the Louisiana Court of Appeals, Second Circuit, stated, as follows:

> "A lease is a synallagmatic contract by which one party gives to the other the enjoyment of a thing 'at a fixed price'. LSA Civil Code Article 2669. Three elements are essential to a valid lease — the thing, the price and the consent. LSA Civil Code Article 2670. Article 2671 provides that the price should be 'certain and determinate' and Article 2674 requires a 'certain stipulated price'. Article 2464 sets forth the essential elements of the price of a sale and requires that the price must be 'certain', 'fixed and determined' and, most significantly, 'serious' and 'not to be out of all proportion with the value of the thing'. The civil law doctrine embodied in Article 2464 applies to all other contracts as well as to sales. *Blanchard* v. *Haber,* 166 La. 1014, 118 So. 117 (1928)."

The renewal periods or extensions of the lease are extremely valuable to the lessee. The agreement covers 1360 acres (only as undivided 3/5 interest in 260 acres thereof). In paragraph 13 of the Stipulation, defendant admits it cut in 1951 and 1952 the following amounts of timber:

Pine Saw Logs	115,062 board feet
Hardwood Saw Logs	9,201 board feet
Pine Pulpwood	34.97 cords
Hardwood Pulpwood	17.44 cords.

It further admits in Paragraph 15 that it has continued to cut timber on the land up until 1969, but has no records showing the amount of timber cut. The amount of timber situated on these tracts, as of the date of trial, is stipulated (Par. 8 & 9) to be the following:

	1100 Acre	*260 Acre*
Pine Saw Logs (board feet)	1,470,720	1,218,260
Hardwood Saw Logs (board feet)	88,560	84,240
Pine Pulpwood (cords)	7,530	340

Applying the stipulated present day stumpage values (Stipulation p. 10) to these figures, the value of the lease for the nine year period beginning 1968 is $178,120 ($113,400 on the 1100 acre tract and $64,720 on the balance).* The ordinary timber lease would

*As stipulated (Par. 11), timber on the property grows and has grown approximately six (6%) per cent to seven (7%) per cent per year. During a renewal period of 9 years the land would produce in natural growth alone, without the expenditure of one single dime by Continental, additional growth of approximately $96,183 to $112,212.

provide that the lessor receive as rent a reasonable percentage of the monetary return from the timber cut. This lease provides no such rent or similar payment to the Lessor. Lessor will receive nothing from the products of the land, in money or in kinds.

Certainly it is contemplated under the doctrine of serious consideration that the Lessor realize some profit from the lease in the form of rent. However, on the face of this agreement the Lessor is guaranteed a loss. The only rent stipulated is the reimbursement of taxes, without interest, 9, 8, 7, 6, 5, 4, 3, 2 and 1 years after the Lessor has paid them. Under this type of arrangement no profit to the Lessor is conceivable. Furthermore the Lessor is permitted to occupy and use the land for a lesser sum than if he were the fee owner. To illustrate these facts, in the first nine year renewal period of the lease, the Lessee paid only $2,728.48 in rent while the owner was paying $4,022.82 in current taxes and assessments. Surely this cannot be considered serious consideration, even if there were no timber on the property and the land was bare. Under no conditions can rent, consisting solely of the reimbursement of taxes, be considered serious consideration as contemplated by Louisiana law.

The term of the original lease having expired, there being no valid provisions for the extension or renewal thereof, judgment will be granted cancelling and erasing the 1950 lease agreement from the public records and reserving plaintiff's right to sue for damages.

Formal judgment should be submitted for execution in compliance with Rule 9(e) of this Court.

THUS DONE AND SIGNED, in Chambers, at Alexandria, Louisiana, on this 8th day of December, 1972.

/s/ NAUMAN S. SCOTT
UNITED STATES
DISTRICT JUDGE

Filed: Dec. 11, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

L. L. BREWTON LUMBER COMPANY, INC.

versus C.A. No. 14,680

CONTINENTAL CAN COMPANY, INC.

JUDGMENT

This cause having come on for trial and having been submitted on written memoranda, the law and evidence being in favor thereof, it is:

ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, L. L. Brewton Lumber Company, Inc., and against Continental Can Company, Inc., cancelling and erasing the lease agreement executed by Louisiana Development Company, Inc. in favor of Mansfield Hardwood Lumber Company dated September 9, 1950 and recorded in Conveyance Book 497, Page 71, Entry Number 48125,

records of Winn Parish, Louisiana, reserving to plaintiff, L. L. Brewton Lumber Company, Inc., the right to recover damages from defendant, Continental Can Company, Inc., for all timber cut and removed since June 14, 1967 from the lands covered by said agreement. Defendant, Continental Can Company, Inc., is to pay all costs. It is further

ORDERED, ADJUDGED AND DECREED that Jesse O. Anders, Clerk of Court and Ex-Officio Recorder of Mortgages of Winn Parish, Louisiana, cancel and erase said lease agreement from the Conveyance and Mortgage Records of Winn Parish.

THUS DONE AND SIGNED at Alexandria, Louisiana, this 10th day of January, 1973.

/s/ NAUMAN S. SCOTT
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM
/s/ HIRAM J. WRIGHT
Hiram J. Wright
P. O. Box 626
Winnfield, Louisiana 71483
Attorney for Plaintiff

/s/ WILLIAM H. BAKER
William H. Baker
Holloway, Baker, Culpepper & Brunson
P. O. Box E
Jonesboro, Louisiana 71251
Attorney for Defendant

Filed: Jan. 15, 1973

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1652
Summary Calendar*

L. L. BREWTON LUMBER COMPANY, INC.,
Plaintiff-Appellee,

versus

CONTINENTAL CAN COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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(June 19, 1973)

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc .v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1652

L. L. BREWTON LUMBER COMPANY, INC.,
Plaintiff-Appellee,
versus

CONTINENTAL CAN COMPANY, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion June 19, 1973, 5 Cir., 1973, ___ F.2d ___).

(August 3, 1973)

Before BROWN, Chief Judge, DYER and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35

Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX B

DEED NO. 48125
LA. DEVELOPMENT CO. INC.
TO
MANSFIELD HARDWOOD LUMBER COMPANY

CONTRACT FOR SALE AND PURCHASE
OF TIMBER, AND LAND LEASE

STATE OF LOUISIANA
PARISH OF CADDO

KNOW ALL MEN BY THESE PRESENTS THAT:

1. Louisiana Development Company, Inc., a Louisiana corporation, hereinafter known and designated as Seller-Lessor, did, by its proper officers, declare and acknowledge that, for the price and consideration and upon the terms and conditions hereinafter set out and expressed, agree to sell, and does hereby sell to Mansfield Hardwood Lumber Company, a Delaware corporation, authorized to do business in Louisiana, appearing and represented by A. S. Johnson, its President, duly authorized hereinafter known and designated as Buyer-Lessee, and Buyer-Lessee agrees to purchase from Seller-Lessor, for the price and consideration and upon the terms and conditions hereinafter set out and expressed, all of Seller-Lessor's right, title and interest in and to (description omitted), it being understood, however, that Seller-Lessor only owns an un-

divided three-fifths (3/5ths) interest in the timber, wood and forest products now standing and growing upon (description omitted), and any warranties hereinafter made shall apply only to the undivided 3/5ths interest owned by Seller-Lessor in the above described lands.

It is specifically understood that there are established public roads crossing portions of the above described tracts of land and also easements for rights of way crossing portions of said land which are being used as railroad rights of way, also certain easements or rights of way for electric power lines crossing portions of said land; and it is specifically understood and agreed that the sale of timber and timber rights and the lease contained in this agreement is made subject to all such easements or rights of way and is also subject to the terms of a lease which Seller-Lessor has made to La Salle Materials Company, Inc.

Seller-Lessor warrants that it has full and complete title to, and the right to sell the timber, wood and forest products, now standing and growing which is contracted to be sold herein, and that the same are free from all liens, mortgages or other encumbrances, and Seller-Lessor grants to Buyer-Lessee full subrogation of all rights and actions of warranty against all prior vendors or owners.

2. As a part of the consideration for this agreement, Seller-Lessor leases and lets and by this act does lease and let unto the Buyer-Lessee, its successors and assigns, to the extent herein provided, and subject to

the terms and conditions hereof, the real estate hereinbefore first described for a term of nine (9) years from the date hereof for the purposes herein expressed, and hereby grants to Buyer-Lessee, its successors and assigns, the right and option to make successive extensions or renewals of this lease for a term of nine (9) years each upon the conditions herein set forth, provided, that this lease may not be extended beyond a date ninety-nine (99) years from the date hereof. In order to renew this lease, Buyer-Lessee shall give written notice to Seller-Lessor of its intention to do so before the expiration of each successive nine-year term.

3. Buyer-Lessee may successively renew or extend this lease for successive nine year terms by giving Seller-Lessor written notice of its intention to do so and by paying to Seller-Lessor on or before the date of the expiration of each nine year term an amount equal to the real property taxes and local assessments which Seller-Lessor has paid on the land described in this lease during the nine years immediately preceding the expiration of such nine year term.

Seller-Lessor shall notify Buyer-Lessee at least thirty days prior to expiration of each nine year term that the lease will expire unless renewed and at the same time advise as to the amount of the necessary renewal payment. If such notice is not timely given, then Buyer-Lessee shall have thirty days after Seller-Lessor gives such notice in which to give notice of intent to renew and to make the payment herein provided for.

4. During the term of this lease or any renewal or extension thereof, as herein provided, Buyer-Lessee shall have the right to remove standing or growing timber, wood and forest products from the leased premises; and it shall also have the right to plant and grow trees and other forest products thereon, and to deaden, cut and remove said trees and forest products, this lease being limited to the above purposes.

5. This lease is solely for the purposes herein specified, and during the term of this lease or any extension or any renewal thereof, Seller-Lessor, its successors and assigns, shall continually have the right to use the lands lease, and each and every part thereof for any and all purposes whatsoever so long as such use does not interfere with the use of the lands leased by Buyer-Lessee for the purposes for which they are leased to its. It is the mutual understanding of the parties hereto that this lease covers only the surface rights in the land for the purposes herein expressed and to sufficient depth to accomplish the purposes herein set forth; that it shall not in any respect affect the rights of Seller-Lessor in the minerals and other components in or under the lands leased or its right or rights with respect to the continued mining of salt or the right to sell and/or lease and otherwise dispose of or contract in connection with the gravel, sand, rock, dirt, limestone, clay, gypsum, oil and gas and other hydrocarbons, all of which rights are specifically reserved by Seller-Lessor, together with the right to continue the operation of a railroad in connection with its salt mining operations, and to construct and operate any extension thereof that it may at any time consider advantageous.

6. The Buyer-Lessee, upon the execution of this instrument, has paid to the Seller-Lessor the sum of Twenty Thousand and no/100 ($20,000.00) Dollars in cash, and other good and valuable consideration, the receipt of which is hereby acknowledged and a full acquittance is granted therefor; the same being paid as consideration for the sale of the timber and for this lease, as well as for the options to renew and all other rights hereby granted to Buyer-Lessee.

7. The Seller-Lessor and Buyer-Lessee agree that this sale and lease agreement is made and is subject to the following conditions and stipulations which are a part of this agreement and the consideration therefor:

(a) It is agreed and recognized and one of the primary purposes for which the Buyer-Lessee hereunder is acquiring said property and its rights hereunder, is the right to use said leased lands in the future during the life of this lease and any renewal or extension thereof for the purpose of growing timber, wood and other forest products on the land and removing and marketing the same from time to time and at will, and that the consideration paid herefor, and the consideration which is agreed to be paid in the event of renewals or extensions of this lease, covers all such rights and privileges as herein provided, in addition to the purchase of the timber, wood and other forest products presently on said property. The Buyer-Lessee shall have the right to cut and remove timber, wood and other products from said property or from any part thereof repeatedly, at such times as it may elect during the life of this lease and any renewals or ex-

tension thereof, and the removal of all or a part of the timber, wood or other forest products from said property or any portion thereof, one or more times, shall not terminate or affect the Buyer-Lessee's right at subsequent times to remove timber and other forest products that may be on said property or may grow thereon during the life of this lease or extensions or renewals thereof.

(b) The Buyer-Lessee shall have the right to release from this lease any portion or all of said lands during the term herein provided or any extension or renewal thereof. The release herefrom shall be executed in the following manner:

(1) The Buyer-lessee shall execute a release in recordable form and shall cause the same to be recorded in the Conveyance Records of the parish where the released land is located and shall furnish to the Seller-Lessor a copy thereof.

(2) The Buyer-Lessee shall execute each release and cause the same to be recorded on or before December 31st of the year in which it is executed.

(3) The amount to be paid for any extension or renewal of this lease shall include taxes and local assessments levied against released property for the full year in which the release is executed and recorded.

(4) As near as may be physically possible, the land released shall be in the form of a square or parallelogram and shall be in tracts of not less than forty (40) acres.

(5) Upon the execution of a release as herein provided, the lands so released shall no longer be subject to this contract, and taxes and local assessments on the said land so released subsequent to the year in which the release is executed and recorded shall no longer be included in the amount to be paid for any renewal or extension of this lease.

(c) The taxes and local assessments paid by Seller-Lessor on lands covered hereby for the year in which this instrument is executed shall be prorated as of the date of the execution hereof for the purpose of calculating the amount to be paid for the first extension or renewal of this lease.

(d) Buyer-Lessee assumes and obligates itself to pay all taxes and local assessments on timber, wood, forest products, its leasehold rights created hereby and all other property owned by it, and to pay any increase in the amount of assessment to Seller-Lessor caused thereby or by reason of operations of Buyer-Lessee or of any improvement or equipment placed on the property in connection with the ownership and operations of Buyer-Lessee.

(e) Seller-Lessor agrees that it will anually furnish to Buyer-Lessee a statement of taxes paid by it upon the lands covered by this lease.

(f) For the purpose of cutting and removing the timber, wood and other forest products on said lands and for conducting of its operations thereon, and particularly its operations in connection with the growing, protecting, conserving, promoting and marketing the timber, wood and forest products, on said lands, the Buyer-Lessee shall have the full and free rights of ingress and egress to and from said property at all times during the life of this lease for its managers, foresters, laborers and other employees and for other vehicles and for other means and methods by which it may elect to carry on its operations on said lands and shall have the right to erect, construct and maintain, and operate on and across said lands, or any part thereof, all such trails, fire-breaks, roads and logging rail-roads, sawmills and planing mills, houses and logging camps that it may elect to construct, operate and maintain in connection with its operations hereunder and its operations on other lands in the vicinity, all of which rights shall remain in full force and effect during the life of this lease and any renewals or extensions hereof, and if the Buyer-Lessee constructs across any of said lands which may be subsequently released, any road or tramroad, or logging railroad, it shall have the right to maintain and use the same for the purpose of conducting its operations hereunder on the remaining lands during the entire life of this contract or any renewals or extensions hereof, by paying the taxes on the tracts crossed by such road, tramroad or logging railroad, in forty-acre subdivisions or such fractional parts thereof as are included in the above described lands. It is expressly stipulated that the Mansfield Hardwood Lumber Company shall have the right to remove all property or construction on said land at the expiration of this lease.

(g) It is agreed and understood that the rights of Buyer-Lessee under this document shall be subject to any existing oil, gas or mineral lease or leases and to any existing rights of any other party or parties to use any portion of the premises for any purpose not incident to or connected with the timber, wood or forest products thereon, and also that the Seller-Lessor shall have the right at all times to grant any new lease affecting the salt, gravel, sand, rock, dirt, limestone, clay, gypsum, oil and gas and other hydrocarbons on such terms and under such conditions as it may see fit and that the Seller-Lessor, or its lessee, contractor or other assign, shall have the necessary rights of ingress and egress for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals and other products or components of the land, together with the right to lay pipelines, build tanks, power stations, telephone lines and other structures thereon, to produce, save, take care of, treat, transport and own said products so produced from said above described land.

However, the Seller-Lessor or those to whom he has leased or otherwise contracted with for the production of oil, gas, minerals or other products as hereinabove set forth shall pay the Mansfield Hardwood Lumber Company, or its assigns, for any and all damage done to timber, wood and other forest products or the property of said Lumber Company on said land in connection with such operation. Any and all taxes levied on such oil, gas, minerals or other products produced from such operation or on any increase in value of the land, in any, caused thereby, or by the equipment placed thereon in connection with such development shall be excluded

in computing the amount to be paid by Buyer-Lessee for any renewal or extension of this lease under the provisions of paragraph 3 hereof.

The parties hereto recognize the rights of the other to ingress and egress to and from the property and each agrees to conduct its operations with the least practicable inconvenience and interference with the rights of the other.

(h) Each Seller-Lessor warrants the title to the timber, wood and other forest products herein leased only so far as the interest owned by each Seller-Lessor, but it is agreed that in the event of eviction of the Buyer-Lessee from any portion of said land on account of failure of title to any portion thereof, that the obligation of the Seller-Lessor under his warranty shall be limited to the refund of the proportionate part received by him in cash of the sum of FIFTY AND NO/100 ($50.00) Dollars per acre on the lands to which title fails or from which Buyer-Lessee is evicted, at the time of such eviction or title failure.

(i) All of the terms, conditions and obligations hereunder shall extend to the heirs, successors and assigns of the parties hereto.

(j) Notices hereunder shall be deemed to be given if mailed to the Seller-Lessor, Louisiana Development Company, Inc., Avenue B and Poplar Street, Hutchinson, Kansas, by registered mail, and notices shall be deemed given if mailed to the Buyer-Lessee at Shreveport, Louisiana, by registered mail, unless either the Buyer-Lessee or Seller-Lessor shall notify the other,

in writing, of a new address to which such notice shall be mailed.

All parties to this act waive the production of tax receipts and of the certificate of mortgages required by Article 3364 of the Revised Civil Code, and release all officers before whom the act is signed, passed or accepted, from all liability on account of the non-production of the same.

IN TESTIMONY WHEREOF, the parties hereto have hereunto signed their names in the presence of the undersigned competent witnesses, this 9th day of September, 1950.

WITNESSES AS TO SIGNATURE
OF DEVELOPMENT COMPANY:
R. N. Apple /s
S. B. Horrell /s

LOUISIANA DEVELOPMENT COMPANY, INC.
Howard J. Carey Pres. /s
Seller-Lessor

WITNESSES AS TO SIGNATURE
OF LUMBER COMPANY:
S. W. Cook /s
A. M. Simon /s

MANSFIELD HARDWOOD LUMBER COMPANY
A. S. Johnson /s
Buyer-Lessee

$22.00 in Documentary stamps affixed and cancelled.

STATE OF KANSAS
COUNTY OF RENO

BEFORE ME, Jeannie E. Lamming, a Notary Public in and for said County and State, on this 13th day of September, 1950, personally came and appeared Howard J. Carey, who in the presence of me, said authority, and R. N. Apple and S. B. Horrell, competent witnesses, declares and acknowledged that he is the identical person who executed the foregoing instrument in writing for and on behalf of Louisiana Development Company, Inc., in the capacity of President of said corporation; that his signature thereto is his own true and genuine signature, and that he executed said instrument in the capacity aforesaid, under property authority, and for the purposes and considerations therein expressed.

Thus done and passed on the day and date hereinabove written, in the presence of the before named and undersigned competent witnesses, who have hereunto subscribed their names, together with said appearer, and me, said Notary, after reading the whole.

WITNESSES:
R. N. Apple /s
S. B. Horrell /s

Howard J. Carey /s

Jeannie E. Lamming /s
NOTARY PUBLIC

(SEAL)
My Commission Expires: April 1, 1953

STATE OF LOUISIANA
PARISH OF CADDO

BEFORE ME, Beatrice Nesbitt, a Notary Public in and for Caddo Parish, La, on this 9th day of September, 1950, personally came and appeared A. S. Johnson, who in the presence of me, said authority, and S. M. Cook and A. M. Simon, competent witnesses, declares and acknowledges that he is the identical person who executed the foregoing instrument in writing for and on behalf of Mansfield Hardwood Lumber Company, in the capacity of President of said corporation; that his signature thereto is his own true and genuine signature, and that he executed said instrument in the capacity aforesaid, under property authority, and for the purposes and considerations therein expressed.

Thus done and passed on the day and date hereinabove written, in the presence of the before named and undersigned competent witnesses, who have hereunto subscribed their names, together with said appearer, and me, said Notary, after reading the whole.

WITNESSES:
S. M. Cook /s
A. M. Simon /s

A. S. Johnson /s

Beatrice Nesbitt /s
NOTARY PUBLIC

(SEAL)

COPY OF RESOLUTION TAKEN FROM MINUTES OF MEETING OF BOARD OF DIRECTORS OF MANSFIELD HARDWOOD LUMBER CO., A DELAWARE CORPORATION, HELD ON FEBRUARY 25, 1948.

* * * *

"RESOLVED, that A. S. Johnson, President, or Brown McCullough, First Vice President, is to have full authority to make purchases of timber, lands, stock, mill supplies and whatever may be necessary to carry on said business, and to sign for the Corporation all notes, drafts, checks, bills of lading, contracts, deeds, and all other documents necessary to be signed; to receipt for and receive all monies, etc., due the Corporation, and to do and perform all other duties that may be necessary in the interest of the Corporation. Subject only to such limitations and control, as may from time to time hereafter be fixed by the Board of Directors."

* * * *

I hereby certify that the foregoing is a true and correct copy of Resolution taken from minutes of meeting of Board of Directors of Mansfield Hardwood Lumber Co., a Delaware Corporation, held on February 25, 1948, and is still in effect on this 6th day of September, 1950.

H. M. Marak /s
Secretary. (seal)

CERTIFICATE OF RESOLUTION OF THE BOARD OF DIRECTORS OF LOUISIANA DEVELOPMENT COMPANY, INC. ADOPTED AT MEETING HELD 30 October 1950

The undersigned, Howard J. Carey, Jr., hereby certifies that he is the Secretary of Louisiana Development Company, Inc., a corporation duly organized and existing under and by virtue of the Laws of the State of Louisiana; that as such Secretary he has custody of the Corporate Seal and records of said Louisiana Development Company, Inc.; that at a Special Meeting of the Board of Directors of said Louisiana Development Company, Inc. duly called and held on the 30th day of October, 1950, the following Resolution was unanimously adopted:

RESOLUTION

> BE IT RESOLVED, That the acts of the President in entering into the contract and agreement for timber sale and lease with the Mansfield Hardwood Lumber Company be, and the same are, hereby, ratified, confirmed and approved.

The undersigned, Howard J. Carey, Jr., hereby further certifies that the above and foregoing Resolution has not been repealed or amended and is still in full force and effect.

IN WITNESS WHEREOF, the said Howard J. Carey, Jr. has hereunto set his hand and affixed the Corporate Seal of Louisiana Development Company, Inc. this 19th day of December, 1950.

Howard J. Carey, Jr. /s
Secretary of Louisiana
Development Company, Inc.

(seal)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

L. L. BREWTON LUMBER COMPANY, INC.

versus C.A. No. 14,680-A

CONTINENTAL CAN COMPANY, INC.

MOTION FOR SUPERSEDEAS AND APPEAL

CONTINENTAL CAN COMPANY moves the Court to stay the enforcement of the judgment in this action pending the disposition of its appeal to the United States Court of Appeals for the Fifth Circuit, and for that purpose to fix the amount of the bond required to be filed by CONTINENTAL CAN COMPANY, INC. at FIFTEEN HUNDRED AND NO/100 ($1,500.00) DOLLARS, and that an appeal issue herein.

HOLLOWAY, BAKER,
CULPEPPER, BRUNSON
& COOPER
ATTORNEYS AT LAW
P. O. DRAWER E
JONESBORO, LOUISIANA
71251

/s/ BOBBY L. CULPEPPER
BOBBY L. CULPEPPER
Attorney for Continental Can
Company, Inc.

Bond amount approved:
/s/ HIRAM J. WRIGHT
HIRAM J. WRIGHT
P. O. Box 626
Winnfield, Louisiana 71483
Attorney for L. L. Brewton
Lumber Company, Inc.

Filed: Feb. 13, 1973

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ALEXANDRIA DIVISION

L. L. BREWTON LUMBER COMPANY, INC.

versus C.A. No. 14,680-A

CONTINENTAL CAN COMPANY, INC.

ORDER

Considering the Motion for Supersedeas and Appeal filed herein by CONTINENTAL CAN COMPANY, INC. for a stay pending CONTINENTAL CAN COMPANY, INC.'s appeal to the United States Court of Appeals for the Fifth Circuit; it appearing to the Court that defendant CONTINENTAL CAN COMPANY, INC. is entitled to such a stay, it is:

Ordered that the execution of and any proceedings to enforce the judgment herein dated January 10th, 1973, and denial of defendant's application for a new trial on January 29th, 1973, be stayed pending the determination of defendant's appeal from such judgment, provided that defendant file and have approved by this Court on or before the 15th day of February, 1973, a bond in the sum of FIFTEEN HUNDRED AND NO/100 ($1,500.00) DOLLARS, conditioned in accordance with Rule Eight of the Federal Rules of Appellant Procedure, and that an appeal issue herein.

Alexandria, Louisiana, this the 8th day of February, 1973.

/s/ NAUMAN S. SCOTT
UNITED STATES
DISTRICT JUDGE

Filed: Feb. 13, 1973

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

L. L. BREWTON LUMBER COMPANY, INC.

versus C.A. No. 14,680-A

CONTINENTAL CAN COMPANY, INC.

SUPERSEDEAS BOND

KNOW ALL MEN BY THESE PRESENTS: That THE AETNA CASUALTY & SURETY COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and having a place of business in the City of Shreveport, State of Louisiana, and duly authorized to carry on a general casualty insurance business within the State of Louisiana, and in the Courts of the United States, is held and firmly bound unto L. L. BREWTON LUMBER COMPANY, INC., plaintiff, in the full and just sum of FIFTEEN HUNDRED AND NO/100 ($1,500.00)

DOLLARS, to be paid to the said L. L. BREWTON LUMBER COMPANY, INC., its administrators, executives, successors or assigns, to which payment, well and truly to be made, it bonds itself, its successors and assigns firmly by these presents. Whereas, on the 10th day of January, 1973, in that action pending in the United States District Court for the Western District of Louisiana, Alexandria Division, between L. L. BREWTON LUMBER COMPANY, INC. as plaintiff, and CONTINENTAL CAN COMPANY, INC., as defendant, Civil Action No. 14,680-A, final judgment was rendered in favor of the said plaintiff, L. L. BREWTON LUMBER COMPANY, INC. and against CONTINENTAL CAN COMPANY, INC., as defendant, new trial denied on January 29th, 1973, declaring that contract of lease incorporated in the agreement executed by Louisiana Development, Inc. in favor of Mansfield Hardwood Lumber Company dated September 9, 1950, and recorded in Conveyance Book 497, Page 71, Entry #48125, records of Winn Parish, Louisiana, to be null, void and of no effect and reserving to the plaintiff, L. L. BREWTON LUMBER COMPANY, INC. the right to recover damages from defendant, CONTINENTAL CAN COMPANY, INC., for all timber cut and removed since June 14, 1967, from the lands covered by said agreement; defendant, CONTINENTAL CAN COMPANY, INC., to pay all cost. It being further Ordered, Adjudged and Decreed that Jesse O. Anders, Clerk of Court and Ex-Officio Recorder of Mortgages of Winn Parish, Louisiana, cancel and erase said instrument, insofar as it provides for the lease of the lands described therein, from the Conveyance and Mortgage Records of Winn Parish, Louisiana; and that said defendant, CONTINENTAL CAN COMPANY, INC., hav-

ing filed a notice of Appeal of such judgment to the United States Court of Appeal for the Fifth Circuit; NOW, THEREFORE, the conditions of this obligation is such, that if the said CONTINENTAL CAN COMPANY, INC. shall prosecute its appeal and shall satisfy the judgment in full, together with cost, interest and damages of delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such cost, interest and damages as the State Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

THE AETNA CASUALTY
& SURETY COMPANY
/s/ J. D. SHOWS
J. D. SHOWS, Agent in Fact

APPROVED:
February 8th, 1973.

/s/ NAUMAN S. SCOTT
UNITED STATES
DISTRICT JUDGE

Filed: Feb. 13, 1973

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

L. L. BREWTON LUMBER COMPANY, INC.

versus C.A. No. 14,680-A

CONTINENTAL CAN COMPANY, INC.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that CONTINENTAL CAN COMPANY, INC., defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the judgment signed on January 10th, 1973, new trial denied January 29th, 1973.

Jonesboro, Louisiana, this the 8th day of February, 1973.

HOLLOWAY, BAKER,
CULPEPPER, BRUNSON
& COOPER
ATTORNEYS AT LAW
P. O. DRAWER E
JONESBORO, LOUISIANA
71251

/s/ BOBBY L. CULPEPPER
BOBBY L. CULPEPPER
Attorney for Continental Can Company, Inc.

Filed: Feb. 13, 1973

Ætna
LIFE & CASUALTY

THE ÆTNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06115

POWER OF ATTORNEY AND CERTIFICATE OF AUTHORITY OF ATTORNEY(S)-IN-FACT

KNOW ALL MEN BY THESE PRESENTS, THAT THE ÆTNA CASUALTY AND SURETY COMPANY, a corporation duly organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, County of Hartford, State of Connecticut, hath made, constituted and appointed, and does by these presents make, constitute and appoint J. D. Shows or John D. Shows, Jr. - -

of Jonesboro, Louisiana , its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred to sign, execute and acknowledge, at any place within the United States, or, if the following line be filled in, within the area there designated , the following instrument(s):

by his sole signature and act, any and all bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance or conditional undertaking, and any and all consents incident thereto not exceeding the sum of FIFTY THOUSAND ($50,000.00) DOLLARS -

and to bind THE ÆTNA CASUALTY AND SURETY COMPANY, thereby as fully and to the same extent as if the same were signed by the duly authorized officers of THE ÆTNA CASUALTY AND SURETY COMPANY, and all the acts of said Attorney(s)-in-Fact, pursuant to the authority herein given, are hereby ratified and confirmed.

This appointment is made under and by authority of the following Standing Resolutions of said Company which Resolutions are now in full force and effect:

VOTED: That each of the following officers: Chairman, President, Any Executive Vice President, Any Senior Vice President, Any Vice President, Any Assistant Vice President, Any Secretary, may from time to time appoint Resident Vice Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

VOTED: That any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the Chairman, the President or a Vice President or by a Resident Vice President, pursuant to the power prescribed in the certificate of authority of such Resident Vice President, and duly attested and sealed with the Company's seal by a Secretary of Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary, or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

This Power of Attorney and Certificate of Authority is signed and sealed by facsimile under and by authority of the following Standing Resolution voted by the Board of Directors of THE ÆTNA CASUALTY AND SURETY COMPANY which Resolution is now in full force and effect:

VOTED: That the signature of each of the following officers: Chairman, President, Any Executive Vice President, Any Senior Vice President, Any Vice President, Any Assistant Vice President, Any Secretary, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding upon the Company in the future with respect to any bond or undertaking to which it is attached.

IN WITNESS WHEREOF, THE ÆTNA CASUALTY AND SURETY COMPANY has caused this instrument to be signed by its Assistant Vice President , and its corporate seal to be hereto affixed this 30th day of May , 1972

THE ÆTNA CASUALTY AND SURETY COMPANY

D. N. Gage
Assistant Vice President

State of Connecticut } ss. Hartford
County of Hartford }

On this 30th day of May , 1972 , before me personally came D. N. GAGE , to me known, who, being by me duly sworn, did depose and say that he is Assistant Vice President of THE ÆTNA CASUALTY AND SURETY COMPANY, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; and that he executed the said instrument on behalf of the corporation by authority of his office under the standing Resolutions thereof.

Mary J. Kingston
Notary Public
My Commission Expires March 31, 1975

CERTIFICATE

I, the undersigned, Secretary of THE ÆTNA CASUALTY AND SURETY COMPANY, a stock corporation of the State of Connecticut, DO HEREBY CERTIFY that the foregoing and attached Power of Attorney and Certificate of Authority remains in full force and has not been revoked; and furthermore, that the Standing Resolutions of the Board of Directors, as set forth in the Certificate of Authority are now in force.

Signed and Sealed at the Home Office of the Company, in the City of Hartford, State of Connecticut. Dated this 8th day of February 1973

By R. T. Rippe
Secretary

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-713

CONTINENTAL CAN COMPANY, INC.,
Petitioner,

versus

L. L. BREWTON LUMBER COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT L. KENNEDY
ATTORNEY AT LAW
P. O. BOX 595
COLFAX, LOUISIANA 71417

CHARLES B. BICE
ATTORNEY AT LAW
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POST OFFICE BOX 670
WINNFIELD, LOUISIANA 71483

ATTORNEYS FOR RESPONDENT,
L. L. BREWTON LUMBER
COMPANY, INC.

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CITATION OF AUTHORITIES

CASES:

Carter v. *Atlanta & St. A.B.R. Co.*, 338 US 430, 438-39 ..... 4, 5

Layne & Bowler Corporation v. *Western Well Works, Inc.*, 236 US 387, 393 6

McDonald v. *Richard*, 203 La. 155, 13 So.2d 712 (1943) 11, 12

Murray v. *Barnhardt*, 117 La. 1023, 42 So. 489 (1906) 9, 10

Northeast Louisiana Detachment of Marine Corp League v. *City of Monroe*, 253 So.2d 107 (La. App. 2d Cir. 1971) 9, 10

Succession of Sonnier v. *Bleu*, 208 So.2d 562, 567 (La. App. 3d Cir. 1968) 13

CITATION OF AUTHORITIES (Continued)

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Wilkerson v. *McCarthy*, 336 US 53, 66-67 (1949) 5, 6

STATUTORY AUTHORITIES:

La. Civil Code art. 2464 (1870) 8, 9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-713

CONTINENTAL CAN COMPANY, INC.,
Petitioner,

versus

L. L. BREWTON LUMBER COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The statement of the case contained in the petition of Continental Can Company, Inc., hereinafter referred to as "Continental," is essentially correct as far as it goes. This statement is made to supply certain important information.

L. L. Brewton Lumber Company, Inc., hereinafter referred to as "Brewton," instituted its suit in the state court. Continental filed a petition to remove and the matter was removed to the Federal Court. Continental

then answered, denying the allegations of Brewton's petition, asserting that Continental is the "holder and owner of a ninety-nine (99) year lease affecting the subject property" and that Brewton "by purchasing the subject property expressly subject to the lease held by the defendant, is estopped from attacking the validity of said lease." Continental's answer, Article 9.

The matter was submitted to and decided by the trial court on a stipulation of fact. The trial court in its original opinion ruled the language included in the sale to Brewton was for the purpose of limiting the warranty of the vendor to Brewton, and does not effect an estoppel against Brewton. It further ruled in its original opinion and opinion on remand that this was not a ninety-nine (99) year lease, but a nine (9) year lease with the right to extend or renew for additional periods of nine (9) years each. Appendix, Continental's petition, p. 18a.

Furthermore, in the reasons for judgment of the District Court, the Court succinctly identified the issue to be decided on remand:

> "Therefore, the issue now before this court is whether or not this is a valid rent or consideration under *Louisiana Law*." (Emphasis added.) Appendix, Continental's petition, p. 18a.

QUESTION PRESENTED BELOW

The issue presented in the Court for the Western District of Louisiana, Alexandria Division, and in the

Fifth Circuit Court of Appeal was a question of fact, to-wit:

> "Was the payment of real property taxes and local assessments by Continental on the property in question a valid rent or consideration under Louisiana Law?"

QUESTION PRESENTED HERE

The question presented to his Honorable Court is a question of fact, identical to the question presented below, to-wit:

> "Was the payment of real property taxes and local assessments by Continental on the property in question a valid rent or consideration under Louisiana Law?"

REASONS FOR DENYING WRIT

In opposition to Continental's stated reasons for granting the writ, the judgment heretofore rendered, affirmed, and rehearing denied will neither have far reaching effect, nor will it affect numerous leases throughout the State of Louisiana and United States. These reasons advanced by petitioner are not only unsupported by the evidentiary record, but, on the contrary, are completely refuted by the record.

The joint stipulation of fact entered into by Continental and Brewton contains the following stipulation in Article 25 thereof:

> "That counsel herein are not familiar with any other leases which contain the same terms, conditions and language of the lease under attack."

As the record verifies, this was a "wild" instrument, the likes of which counsel for both sides had never encountered.

It is readily conceded that this is an important case to Continental, and of course, it is an important case to Brewton. However, the issue decided herein is peculiar to the lease under attack and affects only the parties to this action.

The sole question here is whether a writ of certiorari should issue to the United States Court of Appeal for the Fifth Circuit, in order that this Court might decide whether on nothing more than the unique factual circumstances in this case — the trial court in the Western District of Louisiana, Alexandria Division, was correct in its interpretation of the factual situation.

There is no "federal question" involved in this case. Even if there were, this Court is not obligated to review it. Indeed, it is submitted that this Court's proper role is quite limited. Mr. Justice Frankfurter stated the situation thus:

> "When a case involves no general principal requiring pronouncement but merely its own unique circumstances — " A writ should not be granted. *Carter* v. *Atlanta & St. A.B.R. Co.*, 338 US 430, 438-439.

In the same opinion, referring to the particular case, Mr. Justice Frankfurter stated:

> "There is merely a difference in the application of professionally settled rules to the circumstances of this particular case — for me it is decisive that since the merits involved merely the evaluation of the unique facts in the record, this case does not fall within the proper business of the Court." *Id.*

In *Wilkerson* v. *McCarthy,* 336 US 53, 66-67 (1949), Mr. Justice Frankfurter again addressed the point:

> "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I do not think we should take cases canvassed by two and sometimes three courts *even though those facts may have erroneously appraised.* The division in this Court would seem to demonstrate beyond per adventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances."

Referring to the Court's power to control its docket, he then says:

> "Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the

> operation of our federal system; *importance of the outcome merely to the parties is not enough.* It has been our practice to dismiss a writ of certiorari even after it was granted *where argument exposed a want of conflict or revealed that the case involved no more than its particular facts.*"

In support of his position, Mr. Justice Frankfurter cited the opinion of Chief Justice Taft speaking for a unanimous court in *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 236 US 387, 393, where the Chief Justice said that certiorari should *not be granted* —

> " — except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeal. THE PRESENT CASE CERTAINLY COMES UNDER NEITHER HEAD."

ARGUMENT NO. I

Louisiana law relating to the seriousness of consideration was and is not a novel question. Continental's argument no. I for granting the writ, contains the following statement:

> "Petitioner did not, and could not have foreseen at the time it sought removal of this action from the Louiiana District Court, Parish of Winn, to the United States District Court that the latter court would perceive such a purportedly unresolved question: that is, whether reimbursement by the lessee of property taxes and local assessments paid by the lessor may under any conditions constitute adequate consideration for a lease of real property ..."

Article five (5) of plaintiff's complaint alleges:

> "5.
>
> "(a) ...
>
> "(b) The extensions of the alleged lease under the terms of said instrument are not supported by any *rental* or other *consideration* whatsoever." (Emphasis added.)

Article five (5) of defendant's answer states:

> "5.
>
> "That in answer to the allegations contained in paragraph five (5) of the complaint, defendant specifically denies same."

Brewton has reviewed the pleadings in the record and finds no pleading heretofore filed by Continental relative to any motion to dismiss, or stay order on

the grounds of abstention. Petitioner was aware of the factual and legal issues presented in Brewton's complaint as evidenced by article five (5) of the complaint and answer, as well as the original opinion by the District Court and opinion of the Fifth Circuit Court of Appeal.

Continental chose its forum by virtue of their action to remove the case to the Federal District Court. It is respectfully submitted that Continental's argument that the District Court should have abstained from deciding the patent issues on removal is without merit.

ARGUMENT NO. II

Petitioner's argument that the form of the lease instrument herein was in common use in Louisiana is refuted by its own stipulation of fact number twenty-five (25).

The lease in question was only binding under Louisiana Law if the amount of the rent is serious, that is to say, the amount of rent cannot be out of all proportion to the value of the lease.

La. Civil Code art. 2464 (1870) reads in part:

> "Art. 2464. The price of the sale must be certain, that is to say, fixed and determined by the parties.
>
> . . .

> "It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.
>
> "It ought not to be out of all proportion with the value of the thing; for instance, the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised."

Article 2464 and the Doctrine of Serious Consideration applies to leases as well as sales. *Northeast Louisiana Detachment of Marine Corp League* v. *City of Monroe,* 253 So.2d 107 (La. App. 2d Cir. 1971).

The landmark decision in Louisiana on the Doctrine of Serious Consideration is *Murray* v. *Barnhart,* 117 La. 1023, 42 So. 489 (1906). In considering the validity of the lease before it, the Louisiana Supreme Court stated:

> "At common law the slightest consideration is sufficient to support the most onerous obligation. The inadequacies, as has been said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced. 9 Cyc. 365; A. & E. E. Bol. 6, T. 694. But under our law the consideration 'must be serious'; 'it must not be out of all proportion with the value of the thing.' Article 2464, Civ. Code. That article has special reference to the price of a sale, but the princi-

> pal it involves is not peculiar to sales. *It is a general principal of the civil law, and as old as the civil law itself.*" (Emphasis added.)

Another case involving the validity of a lease is *Northeast Louisiana Detachment of Marine Corp League* v. *City of Monroe*, 253 So.2d 107 (La. App. 2d Cir. 1971), when the Court of Appeal stated:

> "A lease is a synallagmatic contract by which one party gives to the other the enjoyment of a thing 'at a fixed price.' LSA Civil Code Article 2669. Three elements are essential to a valid lease — the thing, the price and the consent. LSA Civil Code Article 2670. Article 2671 provides that the price should be 'certain and determinate' and Article 2674 requires a 'certain stipulated price.' Article 2464 sets forth the essential elements of the price of a sale and requires that the price must be 'certain', 'fixed and determined' and, most significantly, 'serious' and 'not to be out of all proportion with the value of the thing'. The civil law doctrine embodied in Article 2464 applies to all other contracts as well as to sales. *Blanchard* v. *Huber*, 166 La. 1014, 118 So. 117 (1928)."

Additionally, the District Court in its well reasoned judgment made a factual determination that Continental's payment of not more than Two Thousand Seven Hundred Twenty-Eight and 48/100 Dollars ($2,728.48) in taxes during the nine (9) year renewal period beginning in 1968, when compared to the value of the lease

for the same period (One Hundred Seventy-Eight Thousand One Hundred Twenty Dollars [$178,120.00]) was simply not serious rental consideration as called for by Louisiana Law, (petitioner's appendix, p. 21a, 21b) and was out of all proportion to the value of the thing. La. Civil Code art. 2464 (1870).

ARGUMENT NO. III

Continental contends that the deed by which Brewton acquired the lands provides the conveyances made subject to "contract for sale and purchase of timber between Louisiana Development Company, Inc. and Mansfield Hardwood Company." (Continental's petition, p. 16, 17.) Continental further contends Brewton is estopped by the language from attacking the validity of this lease. The trial court rejected this contention.

At the outset, we note that the provision of Brewton's deed referred to above, does not mention any lease. A complete answer to Continental's plea of estoppel is found in *McDonald* v. *Richard*, 203 La. 155, 13 So.2d 712 (1943), in which Richard acquired an interest in a tract of land and subsequently sold Laux and Schuh a mineral interest in said lands. Richard then sold his interest in the land to Whitehead, who sold a one-fourth (1/4) interest to McDonald.

At the expiration of the mineral reservation of the vendors to Richard, McDonald filed suit claiming ownership of one-fourth (1/4) of the minerals. His claim was met by a plea of estoppel based on a declaration

in the deeds to McDonald and his vendor, Whitehead, that declared the property was purchased "subject to" the conveyance of mineral ownership to Laux and Schuh. In rejecting the plea of estoppel, the Louisiana Supreme Court said:

> "A sufficient reason why these clauses in the deed from Whitehead to McDonald cannot serve as an estoppel in this suit is that the pretended sales by Dr. Richard to Laux and Schuh were made before the declarations were made in the sales by Dr. Richard to Whitehead and by Whitehead to McDonald. And certainly these declarations in the sales by Dr. Richard to Whitehead and by Whitehead to McDonald were not made in the interest of Laux and Schuh, or their transferees, or for the benefit of anyone else but the parties who made the declarations, namely, Whitehead and McDonald.
>
> "Even if the declaration in the deed from Dr. Richard to Whitehead, dated September 9, 1936, referring to the deeds purporting to be sales of mineral rights by Dr. Richard to Laux and Schuh, should be deemed sufficiently specific to constitute an acknowledgment that the sales to Laux and Schuh were in fact made, *the acknowledgment would not bind either Whitehead or McDonald to recognize as valid the sales by Dr. Richard to Laux and Schuh.*" (Emphasis added.)

The McDonald case continues to be the law in Louisiana. See *Succession of Sonnier v. Bleu*, 208 So.2d 562, 567 (La. App. 3d Cir. 1968).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the well reasoned opinion of the District Court, as affirmed by the Appellate Court, in this instance reached the only fair and proper conclusion.

The facts in the case, as well as the law applicable thereto have been canvassed and reviewed by two (2) courts. Even though those facts may have been erroneously appraised (which respondent certainly does not concede) the outcome is of importance merely to the parties. No conflict between Courts of Appeal is involved and there is nothing here which is of importance to the public as distinguished from the parties.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing brief in opposition to petition for writ of certiorari has been served upon Continental Can Company, Inc. by mailing a copy of same, in the United States Mail, postage prepaid to Holloway, Baker, Culpepper, Brunson & Cooper, Attorneys at Law, Post Office Drawer E, Jonesboro, Louisiana 71251 and Wilkie, Farr & Gallagher, Attorneys at Law, 1 Chase Manhattan Plaza, New York, New York 10005, counsel of record for Continental Can Company, Inc.

Winnfield, Louisiana, this ____ day of November 1973.

CHARLES B. BICE